

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

June 21, 2006

In the Matter of
Tennessee Gas Pipeline

Docket No. 2006-032
File No. 305-738
Tewksbury

RECOMMENDED DECISION
ON MOTION FOR RECONSIDERATION

On May 25, 2006 a Final Decision was issued in this matter accepting the petitioners' withdrawal of their initial request for administrative review dated February 28, 2006. The Claim was filed by Professor Thomas E. Phalen Jr. on behalf of a group of abutters, and was entitled a "formal request for reconsideration" and treated as a notice of claim. The withdrawal letter was filed by counsel for the group, Donald P. Healey, Esq., and referenced pending judicial review of the matter as the basis for withdrawal.

After the issuance of the Final Decision, Professor Phalen filed a letter dated May 31, 2006 on behalf of the petitioning group renewing the initial request for review. Professor Phalen states that after consulting with Attorney Healey, he is requesting reconsideration on behalf of the petitioning group of abutters on the grounds that the May 25th decision was not "final", and that the initial request for reconsideration was not actually reviewed. The letter then outlines the major points of objection to the project in question, the installation of a high pressure gas pipeline through wetlands resource areas.

For special accommodations for this event, contact Deneen M. Simpson at this address or call (617) 556-1003.
This information is available in alternate format. Call Donald M. Gomes, ADA Coordinator at 617-556-1057. TDD Service - 1-800-298-2207.

DEP on the World Wide Web: <http://www.mass.gov/dep>



Printed on Recycled Paper

A motion to reconsider may be made when a finding of fact or ruling of law is clearly erroneous. 310 CMR 1.01(14)(e). When such a motion repeats matters adequately considered in the Final Decision, renews claims or arguments previously raised, considered and denied, or attempts to raise new claims or arguments it may be summarily denied. Id.

The Final Decision in this case was based on a representation by counsel of record for the petitioners that the group wished to withdraw the Claim for a hearing as the matter is subject to ongoing judicial review referenced by the petitioners as Bruce Whinery v. Massachusetts Department of Environmental Protection et al., Middlesex Superior Court, C.A. No. MICV2005-01401-L.

The Request for Reconsideration first contends that the May 25th Final Decision is not truly final. This is not the case. The May 25, 2006 Final Decision accepted the petitioners' request to withdraw, and thereby concluded the proceedings opened under docket number 2006-032.¹ Although the project may not have all of its required final permits in place, and apparently is subject to the uncertainties of an ongoing judicial challenge, this particular adjudicatory proceeding concluded with the Final Decision of May 25th.

The petitioners then restate their substantive concerns about the design, construction, safety and deviations from approved plans that were raised in the Claim and object that these issues were not reviewed in the Final Decision. This is because the Claim was voluntarily withdrawn. No explanation is given by the group of any reversal of the group's intent to withdraw, other than its continuing desire for review of the substantive concerns outlined. If the

¹ A prior adjudicatory proceeding concerning this same file number and project concluded with a Final Decision issued on June 4, 2004. Matter of Tennessee Gas Pipeline, Docket No. 2004-017, Recommended Final Decision (May 17, 2004) adopted by Final Decision (June 4, 2004) Reconsideration Denied (December 8, 2004). The Claim was dismissed for lack of jurisdiction, as it sought review of a certificate issued by the Secretary of Environmental Affairs under the Massachusetts Environmental Policy Act, or an Order of Conditions issued by the Tewksbury conservation commission.

petitioners seek to rescind the withdrawal, no reason was provided other than the underlying desire for substantive review. I assume that the listed objections and requested relief from this forum were considered when filing the request to withdraw with the assistance of counsel. That request reported an ongoing judicial challenge, and an expected decision from the court as the basis of the group's decision to withdraw. There is also no explanation of Prof. Phalen's authority to file the motion to reconsider as the group's representative. No notification of change of representation, substitution, or withdrawal by attorney Healey as authorized legal counsel for the group, who acted as its representative in requesting withdrawal of the Claim was filed. I find no reason in the request for reconsideration to vacate the group's voluntary withdrawal.

As to the group's substantive concerns with the project - the pipeline's construction design, safety, and claimed deviations from approved plans and materials - no finding of fact or ruling of law with respect to these matters was made in the Final Decision, which was based solely on the group's withdrawal. If petitioners seek to establish violations of a MassDEP permit, changed conditions or other matter that may be addressed by Departmental enforcement, they may request such action through the Department's regional office.

Finally, I take notice of very similar substantive claims concerning the pipeline's structural design, construction methods, as well as alleged changes to approved plans which were dismissed in a prior adjudicatory proceeding at MassDEP for lack of jurisdiction. The 2004 Final Decision in that case found the agency lacked jurisdiction to review or change the final wetlands Order of Conditions² issued by the Conservation Commission, or the certificate issued by the Secretary of Environmental Affairs under the Massachusetts Environmental Policy Act

² No Superseding Order of Conditions from MassDEP's wetlands program was requested for the project file number, and therefore the conservation commission's Order of Conditions became final. Matter of Tennessee Gas Pipeline, Docket No. 2004-017, Recommended Final Decision (May 17, 2004), note 1.

(MEPA). Matter of Tennessee Gas Pipeline, Docket No. 2004-017, Recommended Final Decision (May 17, 2004) adopted by Final Decision (June 4, 2004) Reconsideration Denied (December 8, 2004). Leaving the petitioners' withdrawal aside for a moment, a renewed request for review of the pipeline construction, design and safety concerns, without any newly articulated jurisdictional basis for MassDEP review of the project or new Departmental action, is likely to have lead to a similar dismissal in this proceeding.

Because I find no error of fact or law in the Final Decision I recommend denial of the Motion to Reconsider.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, July 5, 2006.